

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Mar 30, 2021**

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

JO M.,<sup>1</sup>

Plaintiff,

vs.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:20-cv-03036-MKD

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 26, 27

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 26, 27. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing,

<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court grants Plaintiff's  
2 motion, ECF No. 26, and denies Defendant's motion, ECF No. 27.

### 3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
5 1383(c)(3).

### 6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social  
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
9 limited; the Commissioner's decision will be disturbed "only if it is not supported  
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
13 (quotation and citation omitted). Stated differently, substantial evidence equates to  
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
15 citation omitted). In determining whether the standard has been satisfied, a  
16 reviewing court must consider the entire record as a whole rather than searching  
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its  
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are  
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674  
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an  
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless  
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."  
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's  
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

#### 9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within  
11 the meaning of the Social Security Act. First, the claimant must be "unable to  
12 engage in any substantial gainful activity by reason of any medically determinable  
13 physical or mental impairment which can be expected to result in death or which  
14 has lasted or can be expected to last for a continuous period of not less than twelve  
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's  
16 impairment must be "of such severity that he is not only unable to do his previous  
17 work[,] but cannot, considering his age, education, and work experience, engage in  
18 any other kind of substantial gainful work which exists in the national economy."  
19 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to  
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
5 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis  
9 proceeds to step two. At this step, the Commissioner considers the severity of the  
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
11 claimant suffers from "any impairment or combination of impairments which  
12 significantly limits [his or her] physical or mental ability to do basic work  
13 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
15 however, the Commissioner must find that the claimant is not disabled. *Id.*

16 At step three, the Commissioner compares the claimant's impairment to  
17 severe impairments recognized by the Commissioner to be so severe as to preclude  
18 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
20

1 severe than one of the enumerated impairments, the Commissioner must find the  
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the  
4 severity of the enumerated impairments, the Commissioner must pause to assess  
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
6 defined generally as the claimant's ability to perform physical and mental work  
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing work that he or she has performed in  
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
13 If the claimant is capable of performing past relevant work, the Commissioner  
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
15 If the claimant is incapable of performing such work, the analysis proceeds to step  
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's  
18 RFC, the claimant is capable of performing other work in the national economy.  
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
20 the Commissioner must also consider vocational factors such as the claimant's age,

1 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
2 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
4 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
5 work, analysis concludes with a finding that the claimant is disabled and is  
6 therefore entitled to benefits. *Id.*

7       The claimant bears the burden of proof at steps one through four above.  
8 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
9 step five, the burden shifts to the Commissioner to establish that 1) the claimant is  
10 capable of performing other work; and 2) such work “exists in significant numbers  
11 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*  
12 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 13                                   ALJ’S FINDINGS

14       On September 9, 2016, Plaintiff applied for Title XVI supplemental security  
15 income benefits. Tr. 23, 68, 195-200. On October 25, 2016, Plaintiff applied for  
16 Title II disability insurance benefits. Tr. 23, 67, 188-94. Plaintiff alleged a  
17 disability onset date of September 5, 2016 in both applications. Tr. 23, 67-68, 188-  
18 200. The applications were denied initially and on reconsideration. Tr. 115-23,  
19 126-31. Plaintiff appeared before an administrative law judge (ALJ) on October  
20

1 17, 2018. Tr. 43-66. On January 24, 2019, the ALJ denied Plaintiff's claim. Tr.  
2 20-34.

3 At step one of the sequential evaluation process, the ALJ found Plaintiff,  
4 who met the insured status requirements through December 31, 2021, has not  
5 engaged in substantial gainful activity since September 5, 2016. Tr. 25. At step  
6 two, the ALJ found that Plaintiff has the following severe impairments: lumbar  
7 impairment, hyperlipidemia, thyroid problems, and obesity. *Id.*

8 At step three, the ALJ found Plaintiff does not have an impairment or  
9 combination of impairments that meets or medically equals the severity of a listed  
10 impairment. Tr. 26. The ALJ then concluded that Plaintiff has the RFC to perform  
11 light work with the following limitations:

12 [Plaintiff] can do occasional climbing of ramps and stairs; no climbing  
13 of ladders, ropes and scaffolds; and occasional kneeling, crouching,  
14 and crawling. She should avoid exposure to vibrations and hazards.  
15 She can perform jobs with SVP no higher than 3. She can have  
16 incidental contact with the public and occasional interaction with co-  
17 workers.

18 *Id.*

19 At step four, the ALJ found Plaintiff is capable of performing her past  
20 relevant work as a housekeeper/maid. Tr. 29. The ALJ did not make alternative  
step five findings. Therefore, the ALJ concluded Plaintiff was not under a  
disability, as defined in the Social Security Act, from the alleged onset date of  
September 5, 2016 through the date of the decision. Tr. 30.

1 On January 27, 2020, the Appeals Council denied review of the ALJ's  
2 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for  
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

#### 4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying  
6 her disability insurance benefits under Title II and supplemental security income  
7 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
8 issues for review:

- 9 1. Whether the ALJ properly evaluated the medical opinion evidence
- 10 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 11 3. Whether the ALJ conducted a proper step-two analysis; and
- 12
- 13 4. Whether the Appeals Council properly declined to consider new
- 14 evidence.

15 ECF No. 26 at 2.

#### 16 DISCUSSION

##### 17 A. Medical Opinion Evidence

18 Plaintiff contends the ALJ erred in his analysis of the opinions of Caryn  
19 Jackson, M.D.; Myrna Palasi, M.D.; Alnoor Virji, M.D.; and James Irwin, M.D.  
20 ECF No. 26 at 12-19.



1       There are three types of physicians: “(1) those who treat the claimant  
2 (treating physicians); (2) those who examine but do not treat the claimant  
3 (examining physicians); and (3) those who neither examine nor treat the claimant  
4 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”  
5 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
6 Generally, a treating physician’s opinion carries more weight than an examining  
7 physician’s, and an examining physician’s opinion carries more weight than a  
8 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight  
9 to opinions that are explained than to those that are not, and to the opinions of  
10 specialists concerning matters relating to their specialty over that of  
11 nonspecialists.” *Id.* (citations omitted).

12       If a treating or examining physician’s opinion is uncontradicted, the ALJ  
13 may reject it only by offering “clear and convincing reasons that are supported by  
14 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
15 “However, the ALJ need not accept the opinion of any physician, including a  
16 treating physician, if that opinion is brief, conclusory and inadequately supported  
17 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
18 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or  
19 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ  
20 may only reject it by providing specific and legitimate reasons that are supported

1 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81  
2 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may  
3 serve as substantial evidence if it is supported by other independent evidence in the  
4 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

5 *1. Dr. Jackson*

6 Dr. Jackson, a treating physician, rendered two opinions on Plaintiff’s  
7 functioning. Tr. 677-78, 800-02. On March 24, 2017, Dr. Jackson diagnosed  
8 Plaintiff with lumbar radiculopathy, hypothyroidism, gastroesophageal reflux  
9 disease, tobacco dependence, and obesity. Tr. 677-78. She opined Plaintiff has a  
10 significant disability that would make a normal 40-hour workweek unmanageable,  
11 and she would be unable to work for at least 12 months while pursuing treatment.  
12 Tr. 678. On October 10, 2018, Dr. Jackson diagnosed Plaintiff with lumbar  
13 radiculopathy, hypothyroidism, alcoholic hepatitis, chronic hepatitis C, and  
14 alcoholism. Tr. 801. She opined Plaintiff is severely limited in her ability to  
15 perform work activities, meaning Plaintiff is unable to meet the demands of even  
16 sedentary work, and she opined Plaintiff’s limitations would persist for 12 months  
17 with treatment. Tr. 802. Dr. Jackson opined Plaintiff’s impairments are not  
18 primarily the result of alcohol use, and noted Plaintiff’s back pain would persist  
19 with 60 days of sobriety, though a lot of Plaintiff’s hepatitis C symptoms would  
20 resolve with sobriety. *Id.* The ALJ gave Dr. Jackson’s opinions little weight. Tr.

1 28. As Dr. Jackson's opinions are contradicted by the opinion of Dr. Virji, Tr. 87-  
2 89, the ALJ was required to give specific and legitimate reasons, supported by  
3 substantial evidence, to reject the opinion. *See Bayliss*, 427 F.3d at 1216.

4 Defendant presents no argument in opposition to Plaintiff's contention the  
5 ALJ improperly weighed Dr. Jackson's 2017 opinion. *See* EFC No. 27 at 7-8. It is  
6 unclear whether this is an admission by Defendant that the ALJ erred or whether it  
7 was an oversight. As it is not this Court's role to distill potential arguments that  
8 could be made based on the record, for this reason, if no other, the Court would be  
9 justified to find that the ALJ erred in evaluating this opinion and Defendant has  
10 waived the harmless error argument. *See Eberle v. City of Anaheim*, 901 F.2d 814,  
11 818 (9th Cir. 1990) (issue not raised in opening appellate brief deemed waived);  
12 *Wilcox v. Commissioner*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1998) ("[a]rguments  
13 not addressed in a brief are deemed abandoned"); *see also Justice v. Rockwell*  
14 *Collins. Inc.*, 117 F.Supp.3d 1119, 1134 (D. Or. 2015), *aff'd*, 720 F. App'x 365  
15 (9th Cir. 2017) ("if a party fails to counter an argument that the opposing party  
16 makes ... the court may treat that argument as conceded") (citation and internal  
17 quotations and brackets omitted); *Silva v. City of San Leandro*, 744 F. Supp. 2d  
18 1036, 1050 (N.D. Cal. 2010) ("Plaintiffs do not address this argument in their  
19 Opposition brief, implicitly conceding that these claims fail."); *Tatum v. Schwartz*,  
20 No. Civ. S-06-01440 DFL EFB, 2007 WL 419463, \*3 (E.D. Cal. Feb. 5, 2007)

(explaining that a party “tacitly concede[d][a] claim by failing to address defendants’ argument in her opposition.”); *Kinley v. Astrue*, No. 1:12-cv-740-JMS-DKL, 2013 WL 494122, \*3 (S.D. Ind. Feb. 8, 2013) (“The Commissioner does not respond to this [aspect of claimant’s] argument, and it is unclear whether this is a tacit admission by the Commissioner that the ALJ erred or whether it was an oversight. Either way, the Commissioner has waived any response.”). However, a court generally has discretion to consider even a waived argument. *See In re Hanford Nuclear Res. Lit.*, 534 F.3d 986, 1007 (9th Cir. 2008) (exercising discretion to review waived claim); *Brass v. Cnty. of Los Angeles*, 328 F.3d 1192, 1197 (9th Cir. 2003) (explaining that the decision whether to review waived issues “lies within the discretion of the district court”). The Court has considered Plaintiff’s argument and finds the ALJ erred in his consideration of Dr. Jackson’s opinions.

First, the ALJ found Dr. Jackson’s opinions were temporary in nature, and the 2018 opinion was based in part on a condition that did not meet the duration requirement. Tr. 28. Temporary limitations are not enough to meet the durational requirement for a finding of disability. 20 C.F.R. §§ 404.1505(a), 416.905(a) (requiring a claimant’s impairment to be expected to last for a continuous period of not less than twelve months); 42 U.S.C. § 423(d)(1)(A) (same); *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008) (affirming the

1 ALJ's finding that treating physicians' short-term excuse from work was not  
2 indicative of "claimant's long-term functioning").

3 Dr. Jackson opined in 2017 that Plaintiff's limitations would last at least 12  
4 months, which meets the duration requirement. Tr. 678. Dr. Jackson opined in  
5 2018 that Plaintiff's limitations would last 12 months, which again meets the  
6 duration requirement. Tr. 802. The ALJ noted the 2018 opinion was based in part  
7 on Plaintiff's recent hepatitis C diagnosis, which did not meet the duration  
8 requirement. Tr. 28. However, Dr. Jackson acknowledged that a lot of Plaintiff's  
9 hepatitis C symptoms would resolve within 60 days of sobriety and treatment, yet  
10 still opined Plaintiff would be unable to perform even sedentary work for 12  
11 months. Tr. 802. As such, Dr. Jackson's opinion indicates that Plaintiff's inability  
12 to work for 12 months was not dependent on her hepatitis C diagnosis. The ALJ  
13 erred in rejecting Dr. Jackson's opinions as temporary limitations.

14 Second, the ALJ found Dr. Jackson's opinions were inconsistent with her  
15 recommendation that Plaintiff increase her activity level. Tr. 28. A medical  
16 opinion may be rejected if it is unsupported by medical findings. *Bray*, 554 F.3d at  
17 1228; *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004);  
18 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*, 242  
19 F.3d 1144, 1149 (9th Cir. 2001); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.  
20 1992). Furthermore, a physician's opinion may be rejected if it is unsupported by

1 the physician's treatment notes. *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir.  
2 2003). In March 2017, Dr. Jackson recommended Plaintiff increase her activity  
3 level to five to seven days per week of walking. Tr. 28 (citing Tr. 694, 771).  
4 However, Dr. Jackson recommended Plaintiff "start slow and increase as tolerated  
5 until you are walking for 45 [minutes] to one hour." Tr. 694, 771. Encouragement  
6 to start slowly and increase walking to a total of 45 minutes per day is not  
7 inconsistent with an inability to sustain full-time work. Further, the ALJ does not  
8 point to any evidence that Plaintiff was able to reach the goal of walking even 45  
9 minutes in a day, nor evidence that demonstrates Plaintiff could stand and walk up  
10 to six hours per day as required by light work. Defendant argues the objective  
11 evidence in Dr. Jackson's medical records are inconsistent with Dr. Jackson's 2018  
12 opinion. ECF No. 27 at 7-8. However, the ALJ does not offer any analysis of the  
13 evidence that is inconsistent with Dr. Jackson's opinions other than finding the  
14 opinion is inconsistent with the recommendation to increase walking. Tr. 28. As  
15 such, the Court will not consider this post hoc rational. *See Orn v. Astrue*, 495  
16 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only the reasons provided  
17 by the ALJ in the disability determination and may not affirm the ALJ on a ground  
18 upon which he did not rely.") The ALJ erred in rejecting Dr. Jackson's opinions as  
19 inconsistent with the recommendation that Plaintiff increase her walking to 45 to  
20 60 minutes per day.

1 Third, the ALJ found Dr. Jackson's 2017 opinion did not consider Plaintiff's  
2 alcohol use. Tr. 28. An ALJ may discount a medical opinion that does not  
3 consider a claimant's ongoing substance abuse. *Cothrell v. Berryhill*, 742 Fed.  
4 App'x 232, 236 (9th Cir. July 18, 2018) (unpublished opinion); *Chavez v. Colvin*,  
5 No. 3:14-cv-01178-JE, 2016 WL 8731796, at \*8 (D. Or. July 25, 2016)  
6 (unpublished opinion). At the time of the opinion, Plaintiff had been sober for  
7 over 15 years, and she did not relapse until 2018. Tr. 48, 733, 755. The ALJ  
8 acknowledged Plaintiff's alcohol use was in remission until August 2018, and  
9 found Plaintiff's alcohol use was not a severe impairment. Tr. 26. The ALJ erred  
10 in rejecting Dr. Jackson's 2017 opinion due Dr. Jackson not addressing Plaintiff's  
11 alcohol use.

12 On remand, the ALJ is instructed to reconsider both of Dr. Jackson's  
13 opinions and incorporate the limitations into the RFC or give specific and  
14 legitimate reasons, supported by substantial evidence, to reject the opinions.  
15 Plaintiff also challenges the ALJ's consideration of the opinions of Dr. Palasi, Dr.  
16 Virji, and Dr. Irwin. ECF No. 26 at 15- 19. As the case is being remanded to  
17 reconsider Dr. Jackson's opinions, the ALJ is also instructed to reconsider the  
18 opinions of Dr. Palasi, Dr. Virji, and Dr. Irwin. For the purposes of the remand,  
19 the Court notes that Dr. Irwin opined there was insufficient evidence to assess  
20 Plaintiff's RFC, and Plaintiff was found not to be disabled because of her failure to

1 supply needed medical evidence. Tr. 109, 111; 20 C.F.R. §§ 404.1516, 416.916.  
2 Plaintiff did not respond to calls and letters, and as such a needed consultative  
3 examination could not be completed, and Plaintiff did not return the activities of  
4 daily living form. Tr. 108. While the ALJ summarized Dr. Irwin's opinion as not  
5 imposing any limitation on Plaintiff's functioning, Dr. Irwin did not indicate that  
6 Plaintiff has no limitations, but rather that there was insufficient evidence to  
7 determine her limitations. Given this period of time during which a State agency  
8 medical consultant found there was insufficient evidence to determine Plaintiff's  
9 RFC, the ALJ is also instructed on remand to call a medical expert at the hearing to  
10 help determine Plaintiff's medically determinable impairments, whether she meets  
11 or equals a Listing, her RFC, and to provide an opinion on the onset of disability  
12 should the expert give a disabling opinion.

### 13 **B. Plaintiff's Symptom Claims**

14 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
15 convincing in discrediting her symptom claims. ECF No. 26 at 4-9. An ALJ  
16 engages in a two-step analysis to determine whether to discount a claimant's  
17 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
18 "First, the ALJ must determine whether there is objective medical evidence of an  
19 underlying impairment which could reasonably be expected to produce the pain or  
20 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).



1 “The claimant is not required to show that [the claimant’s] impairment could  
2 reasonably be expected to cause the severity of the symptom [the claimant] has  
3 alleged; [the claimant] need only show that it could reasonably have caused some  
4 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

5 Second, “[i]f the claimant meets the first test and there is no evidence of  
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
9 omitted). General findings are insufficient; rather, the ALJ must identify what  
10 symptom claims are being discounted and what evidence undermines these claims.  
11 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas*, 278 F.3d at 958 (requiring the ALJ to  
12 sufficiently explain why it discounted claimant’s symptom claims)). “The clear  
13 and convincing [evidence] standard is the most demanding required in Social  
14 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting  
15 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting  
17 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
18 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
19 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; 5) treatment, other than medication, an individual receives or has  
2 received for relief of pain or other symptoms; 6) any measures other than treatment  
3 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
4 factors concerning an individual's functional limitations and restrictions due to  
5 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§  
6 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in  
7 an individual's record," to "determine how symptoms limit ability to perform  
8 work-related activities." SSR 16-3p, 2016 WL 1119029, at \*2.

9 The ALJ found that Plaintiff's medically determinable impairments could  
10 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's  
11 statements concerning the intensity, persistence, and limiting effects of his/her  
12 symptoms were not entirely consistent with the evidence. Tr. 27.

13 The ALJ's evaluation of Plaintiff's symptom claims and the resulting  
14 limitations relies largely on the ALJ's assessment of the medical evidence. Having  
15 determined a remand is necessary to readdress the medical source opinions, any  
16 reevaluation must necessarily entail a reassessment of Plaintiff's subjective  
17 symptom claims. Thus, the Court need not reach this issue and on remand the ALJ  
18 must also carefully reevaluate Plaintiff's symptom claims in the context of the  
19 entire record. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because  
20

1 we remand the case to the ALJ for the reasons stated, we decline to reach  
2 [plaintiff's] alternative ground for remand.”).

### 3 C. Step Two

4 Plaintiff contends the ALJ erred at step two by failing to identify Plaintiff's  
5 depression and hepatitis C as severe impairments. ECF No. 26 at 10-12. At step  
6 two of the sequential process, the ALJ must determine whether claimant suffers  
7 from a “severe” impairment, i.e., one that significantly limits her physical or  
8 mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c).

9 To establish a severe impairment, the claimant must first demonstrate that  
10 the impairment results from anatomical, physiological, or psychological  
11 abnormalities that can be shown by medically acceptable clinical or laboratory  
12 diagnostic techniques. 20 C.F.R. §§ 404.1521, 416.921. In other words, the  
13 claimant must establish the existence of the physical or mental impairment through  
14 objective medical evidence (*i.e.*, signs, laboratory findings, or both) from an  
15 acceptable medical source; the medical impairment cannot be established by the  
16 claimant's statement of symptoms, a diagnosis, or a medical opinion. *Id.*

17 An impairment may be found to be not severe when “medical evidence  
18 establishes only a slight abnormality or a combination of slight abnormalities  
19 which would have no more than a minimal effect on an individual's ability to  
20 work....” Social Security Ruling (SSR) 85-28 at \*3. Similarly, an impairment is

1 not severe if it does not significantly limit a claimant's physical or mental ability to  
2 do basic work activities; which include walking, standing, sitting, lifting, pushing,  
3 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;  
4 understanding, carrying out and remembering simple instructions; use of judgment,  
5 responding appropriately to supervision, coworkers and usual work situations; and  
6 dealing with changes in a routine work setting. 20 C.F.R. § 416.922(a); SSR 85-  
7 28.<sup>2</sup>

8 Step two is "a de minimus screening device [used] to dispose of groundless  
9 claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). "Thus, applying  
10 our normal standard of review to the requirements of step two, [the Court] must  
11 determine whether the ALJ had substantial evidence to find that the medical  
12 evidence clearly established that [Plaintiff] did not have a medically severe  
13 impairment or combination of impairments." *Webb v. Barnhart*, 433 F.3d 683, 687  
14 (9th Cir. 2005).

15 The ALJ explicitly found Plaintiff's hepatitis C was not a severe impairment  
16 because it did not meet the 12-month durational requirement, Tr. 26, and the ALJ  
17

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18  
19 <sup>2</sup> The Supreme Court upheld the validity of the Commissioner's severity  
20 regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54  
(1987).

1 did not list Plaintiff's depression as a severe impairment nor did the ALJ address  
2 depression in the decision, thereby finding depression was not a severe impairment  
3 without any explanation.

4 First, Plaintiff argues the ALJ harmfully erred in failing to consider her  
5 depression as a severe impairment, because the RFC did not consider Plaintiff's  
6 depression symptoms, including isolation, hopelessness, and suicidal ideation.  
7 ECF No. 26 at 10-11. Defendant argues the ALJ considered Plaintiff's depression  
8 as he assessed Plaintiff's mental limitations at step three and included limitations  
9 in the RFC to account for even mild symptoms. ECF No. 27 at 10-12. However,  
10 the ALJ assessed Plaintiff's mental limitations due to her alcohol use, not  
11 depression. Tr. 26. Plaintiff does not cite to any opinion evidence to support her  
12 argument that depression causes additional limitations not considered by the ALJ.  
13 Thus, Plaintiff has not demonstrated the ALJ erred in finding her depression was  
14 not a severe impairment.

15 Next, Plaintiff argues her hepatitis C was a severe impairment because it  
16 meets the duration requirement, as it was expected to last at least 12 months. ECF  
17 No. 26 at 11-12. However, Plaintiff does not point to evidence in the medical  
18 records of her hepatitis C limiting her besides Dr. Jackson's opinion, *id.*, and Dr.  
19 Jackson opined that a lot of Plaintiff's hepatitis C symptoms would resolve  
20

1 following 60 days of sobriety and treatment, Tr. 802. As such, Plaintiff has not  
2 demonstrated the ALJ harmfully erred at step two.

3 However, as the case is being remanded to reconsider the medical opinion  
4 evidence, the ALJ is also instructed to perform the five-step analysis anew,  
5 including considering whether Plaintiff's hepatitis C and depression are now  
6 severe medically determinable impairments and to assess any additional limitations  
7 caused by the impairments.

#### 8 **D. Appeals Council**

9 Plaintiff contends the Appeals Council erred in failing to properly consider  
10 new evidence submitted at the Appeals Council level. ECF No. 26 at 19-21. The  
11 Appeals Council will review a case if it receives additional evidence that is new  
12 and material and that relates to the period on or before the date of the ALJ  
13 decision, and it finds there is a reasonable probability that the additional evidence  
14 would change the outcome of the case. 20 C.F.R. §§ 404.970(a)(5),  
15 416.1470(a)(5). However, the Appeals Council will only consider additional  
16 evidence when deciding whether to review a case if the claimant shows good cause  
17 for not meeting the five-day rule because of one of the reasons listed in 20 C.F.R.  
18 §§ 404.935(b), 416.1435(b). If the claimant submits new evidence and the  
19 Appeals Council does not find that the claimant had good cause for the untimely  
20 submission of the evidence, the Appeals Council will send the claimant a notice

1 that explains why it did not accept the additional evidence. 20 C.F.R. §§  
2 404.970(c), 416.1470(c). When the Appeals Council considers new evidence in  
3 declining review, that evidence becomes part of the administrative record, which  
4 this court must consider in determining whether the ALJ's decision is supported by  
5 substantial evidence. *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1159-  
6 60 (9th Cir. 2012). As the case is being remanded to reconsider Dr. Jackson's  
7 opinions, the ALJ is also instructed to consider the evidence submitted to the  
8 Appeals Council.

#### 9 **E. Remedy**

10 Plaintiff urges this Court to remand for an immediate award of benefits.  
11 ECF No. 26 at 21.

12 “The decision whether to remand a case for additional evidence, or simply to  
13 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d  
14 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).  
15 When the Court reverses an ALJ's decision for error, the Court “ordinarily must  
16 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,  
17 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the  
18 proper course, except in rare circumstances, is to remand to the agency for  
19 additional investigation or explanation”); *Treichler v. Comm'r of Soc. Sec. Admin.*,  
20 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security

1 cases, the Ninth Circuit has “stated or implied that it would be an abuse of  
2 discretion for a district court not to remand for an award of benefits” when three  
3 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the  
4 credit-as-true rule, where (1) the record has been fully developed and further  
5 administrative proceedings would serve no useful purpose; (2) the ALJ has failed  
6 to provide legally sufficient reasons for rejecting evidence, whether claimant  
7 testimony or medical opinion; and (3) if the improperly discredited evidence were  
8 credited as true, the ALJ would be required to find the claimant disabled on  
9 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874  
10 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,  
11 the Court will not remand for immediate payment of benefits if “the record as a  
12 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759  
13 F.3d at 1021.

14       The Court finds remand for additional proceedings is necessary as conflicts  
15 remain in the evidence, including conflicts between medical opinions that require  
16 resolution. The imaging submitted at the Appeals Council level also does not  
17 provide a basis to remand for immediate benefits. While Plaintiff also urges  
18 remand for benefits based on the ALJ’s rejection of her symptom claims, the Court  
19 did not reach this argument, and notes there are conflicts in the record that need  
20



1 resolution. As such, the case is remanded for additional proceedings consistent  
2 with this Order.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the  
5 ALJ's decision is not supported by substantial evidence and is not free of harmful  
6 legal error. Accordingly, **IT IS HEREBY ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 26**, is **GRANTED**.

8 2. Defendant's Motion for Summary Judgment, **ECF No. 27**, is **DENIED**.

9 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff  
10 **REVERSING** and **REMANDING** the matter to the Commissioner of Social  
11 Security for further proceedings consistent with this recommendation pursuant to  
12 sentence four of 42 U.S.C. § 405(g).

13 The District Court Executive is directed to file this Order, provide copies to  
14 counsel, and **CLOSE THE FILE**.

15 DATED March 30, 2021.

16 *s/Mary K. Dimke*  
17 MARY K. DIMKE  
18 UNITED STATES MAGISTRATE JUDGE  
19  
20